BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHAUN D. MCCOLLUM, SR. Claimant	)	
VS.	)	Docket No. 1,059,299
KLIMA WELL SERVICE, INC. Respondent	)	
AND	)	
SEABRIGHT INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the April 4, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 4, 2012, preliminary hearing and exhibits thereto; the transcript of the March 30, 2012, deposition of Dennis Klima and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges that on the date he was injured in a motor vehicle accident, he was employed by respondent and sustained personal injuries arising out of and in the course of his employment with respondent. At the preliminary hearing, claimant sought payment of outstanding medical bills, that Dr. David Hufford and Dr. Matthew N. Henry be approved as authorized treating physicians, and temporary total disability benefits from April 12, 2011, through July 1, 2011, and temporary partial disability compensation from July 2, 2011, thereon.

Respondent asserted claimant was not its employee on the date of the motor vehicle accident, but rather was an independent contractor. Respondent contends claimant operated his own business known as S & S Pulling Unit and Roustabout Service (S & S) and contracted with respondent. Consequently, claimant's accident is not covered by the Kansas Workers Compensation Act.

The ALJ determined in a brief and succinct Order that claimant was an independent contractor and not an employee of respondent. Accordingly, ALJ Fuller denied claimant's request for payment of outstanding medical bills, authorized medical treatment and temporary total and temporary partial disability payments. The only issue is:

When claimant was injured in a motor vehicle accident on April 12, 2011, was he an employee of respondent or an independent contractor?

FINDINGS OF FACT, PRINCIPLES OF LAW AND ANALYSIS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant had a long relationship with respondent. Claimant testified that on July 17, 1989, he began working with respondent and continued doing so for 12-13 years. Following that time period, claimant ran an oil rig for respondent for three years. He then worked for Christopher River Oil & Gas for six months, but then returned to work for respondent. Claimant testified that he and Dennis Klima, co-owner and president of respondent, started a business known as Integrity Pipe Company (Integrity). Claimant is uncertain the dates that business operated, but it was closed after operating for one to one and one-half years. According to Dennis Klima, claimant provided services for respondent for several years under the name of Integrity after it failed. After claimant paid off the debts of Integrity, he formed S & S in February 2011.

Dennis Klima indicated S & S and respondent entered into a verbal contract for S & S to provide services to respondent. Dennis Klima testified, "Shaun had a business, S & S Pulling Unit and Roustabout Service, and I hired him to run one of our pulling units. I didn't actually hire him, only through his business."[1] On several occasions Dennis Klima told claimant he needed to know claimant was covered under some type of insurance, whether it be workers compensation or a Blue Cross & Blue Shield health insurance policy. He later understood from a secretary claimant was getting insurance. Claimant confirmed he had conversations with Dennis Klima and a secretary about getting workers compensation insurance. Claimant testified S & S had no business equipment and its only asset was a pick-up truck titled under Integrity. The only employee of S & S was claimant and S & S is a sole proprietorship. Claimant ran a pulling unit for respondent. Claimant

[1] Klima Depo. at 40-41.

personally provided all services to respondent. Claimant was paid $30.00 per hour, and his rate of pay was approximately double that of all other employees of respondent. On the date of claimant's accident he had no health insurance or workers compensation insurance.

On April 12, 2011, claimant left respondent's job site and was driving a "form unit" that belonged to respondent to a new work site and had a motor vehicle accident. At the time of the accident claimant was alone in the form unit. As a result of the accident, claimant suffered severe injuries and had to be taken by air ambulance from Edwards County, Kansas, to Wesley Medical Center in Wichita, Kansas.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.

In *Hill*,[4] the Kansas Court of Appeals stated:

> Under the KWCA, an employee is defined, in part, as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer," but that definition does not include self-employed persons. K.S.A. 2008 Supp. 44-508(b). Although not defined in the KWCA, our courts have consistently defined an independent contractor as one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of his or her employer, except as to the results or product of his or her work. *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991); *Krug v. Sutton*, 189 Kan. 96, 98, 366 P.2d 798 (1961).
>
> The parameters of the "right to control" test were discussed in *Falls v. Scott*, 249 Kan. at 64:
>
> > "whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner

---

[2] K.S.A. 2010 Supp. 44-501(a).

[3] K.S.A. 2010 Supp. 44-508(g).

[4] *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 210 P.3d 647 (2009). *Hill* was appealed to the Kansas Supreme Court (*Hill v. Kansas Dept. of Labor*, 292 Kan. 17, 248 P.3d 1287 (2011)), but the issue of employee versus independent contractor was not appealed.

> in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor."

Further, our Supreme Court has consistently reiterated that no absolute rule may be applied to determine whether an individual is an employee or an independent contractor. Rather, each case must be determined based on its own particular facts. *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 270, 32 P.3d 1146 (2001); *Schroeder v. American Nat'l Bank*, 154 Kan. 721, 724, 121 P.2d 186 (1942). In doing so, we primarily apply the "right to control test," but generally consider several additional factors, including:

> "1) [t]he existence of the right of the employer to require compliance with instructions;
> "2) the extent of any training provided by the employer;
> "3) the degree of integration of the worker's services into the business of the employer;
> "4) the requirement that the services be provided personally by the worker;
> "5) the existence of hiring, supervision, and paying of assistants by the workers;
> "6) the existence of a continuing relationship between the worker and the employer;
> "7) the degree of establishment of set work hours;
> "8) the requirement of full-time work;
> "9) the degree of performance of work on the employer's premises;
> "10) the degree to which the employer sets the order and sequence of work;
> "11) the necessity of oral or written reports;
> "12) whether payment is by the hour, day or job;
> "13) the extent to which the employer pays business or travel expenses of the worker;
> "14) the degree to which the employer furnishes tools, equipment, and material;
> "15) the incurrence of significant investment by the worker;
> "16) the ability of the worker to incur a profit or loss;
> "17) whether the worker can work for more than one firm at a time;
> "18) whether the services of the worker are made available to the general public;
> "19) whether the employer has the right to discharge the worker; and
> "20) whether the employer has the right to terminate the worker."
> *Crawford*, 17 Kan. App. 2d at 710; see *Hartford*, 272 Kan. at 271.[5]

[5] *Id.*, at 221-223.

Claimant testified that Dennis Klima, co-owner and president of respondent, exercised "[p]retty much total control"[6] over claimant's daily activities. Dennis Klima testified he had the right to tell claimant to perform a task differently, control how claimant did the work he was performing for respondent and tell claimant what job sites to work at and when to go. Claimant would work side-by-side respondent's employees and Dennis Klima had the right to monitor claimant's activities. Claimant testified that he was not treated any differently than respondent's other employees. Dennis Klima testified, "I have the authority to tell him what to do, yes."[7] Claimant testified that Dennis Klima and Gary Klima had the right to fire claimant at any time.

In reviewing the twenty additional factors cited in *Hill,* this Board Member makes the following findings:

1. Respondent had the right to require claimant's compliance with its instructions. Claimant testified that each morning he was given instructions by Dennis Klima on what jobs needed to be completed that day. Dennis Klima testified, "If he didn't want to do it, then yes, I had the right to fire him as a contractor --"[8]

2. No evidence was presented as to how or from whom claimant received his training.

3. Claimant's services were an integral part of respondent's business. Dennis Klima testified that respondent services the downhole repair, work overs and completions of oil wells for other companies. Claimant testified he would run a pulling unit that would service the oil wells of other companies.

4. Claimant's services were provided personally.

5. Dennis Klima testified claimant could have hired an employee for respondent to assist claimant on jobs he performed for respondent. However, if claimant worked for respondent on a job for a third party, the third party had to approve claimant hiring another employee or contractor.

6. Claimant d/b/a S & S provided services for respondent from February 2011 and was still providing services for respondent on April 4, 2012, the date of the preliminary hearing. Claimant previously provided similar services to respondent for several years under the name of Integrity. Dennis Klima testified that he tried to keep claimant busy as he was a regular contractor.

---

[6] P.H. Trans. at 11.

[7] Klima Depo. at 19.

[8] *Id.*, at 17.

7. Respondent told claimant when to show up for work each day.

8. Statements prepared by claimant and submitted to respondent for payment showed that from February 14, 2011, claimant worked in excess of fifty hours each week through the week prior to April 12, 2011.

9. Claimant's work activities were performed at respondent's job site, at respondent's shop or involved travel between job sites and/or respondent's shop.

10. As stated above, at the beginning of each day respondent told claimant what jobs to perform. While operating respondent's oil rig, claimant used his own judgment to perform the work he was assigned.

11. No evidence was presented as to whether claimant was required to make oral or written reports to respondent.

12. Claimant was paid by the hour and was paid each week.

13. The evidence presented indicated claimant would arrive at work each day and then almost always use his pick-up to get to the job site. When he used his own pick-up, claimant was not reimbursed for mileage.

14. Respondent provided all of claimant's tools and equipment, with the exception of claimant's pick-up. While working in respondent's shop, claimant would use respondent's tools. At job sites, claimant would operate respondent's pulling units and would use tools and equipment belonging to respondent to operate the pulling unit. Claimant could not have performed his job duties without using respondent's tools and equipment.

15. Claimant had little or no investment in equipment or inventory.

16. Claimant was, in essence, guaranteed a profit. Claimant did not bid on jobs, nor did he provide tools, equipment or materials. His only expense was gasoline for his pick-up. Claimant was paid hourly and, therefore, could not suffer a loss.

17. Claimant testified he could work for other employers, but he would have to use the other employer's equipment and working for another employer would have to be okayed by Dennis Klima. Dennis Klima testified that respondent placed no restrictions on claimant as to whom he could provide services.

18. Claimant was never asked if S & S did any advertising or if he held his services out to the general public. Claimant testified no one knew about S & S except himself, Dennis Klima, Gary Klima and a secretary. The record contains sufficient evidence to show claimant worked exclusively for respondent and worked numerous hours each week.

19. & 20. As stated above, claimant testified he could be fired at any time by Dennis or Gary Klima. Dennis Klima testified respondent could terminate the services of S & S on a particular project.

This Board Member is cognizant of several other important facts that do not fall neatly under the twenty factors set out in *Hill*. Respondent did not withhold any employment taxes from claimant's wages and claimant never received a W-2 form from respondent. Claimant submitted his hours on weekly statements that contained the notation S & S Pulling Unit and Roustabout Service. On May 11, 2011, claimant and Dennis Klima signed a document that stated, "I, Shaun D. McCollum, Sr., owner and operator of S & S Pulling Unit and Roustabout Service, was hired by Klima Well Service, Inc., to do contract work."[9] Claimant testified the statement was true and correct before and after his April 12, 2011, accident. The fact that claimant signed a document declaring he was an independent contractor is not necessarily dispositive.

Dennis Klima testified that respondent would from time-to-time use contractors other than S & S. However, unlike claimant, those contractors were not required to come to work every day at 7:00 a.m. Respondent required the other contractors to carry workers compensation insurance. Dennis Klima told claimant he needed to be covered by insurance, whether it be workers compensation or Blue Cross & Blue Shield. However, Dennis Klima testified he never required claimant to provide proof he had workers compensation insurance. It was acknowledged by claimant that it was advantageous for him to be an independent contractor, rather than an employee of respondent. The arrangement was also advantageous for respondent.

This Board Member finds that claimant was an employee of respondent, not an independent contractor. Claimant and respondent both believed claimant was an independent contractor, not an employee. The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[10] The preponderance of the evidence shows respondent exercised control over claimant's work activities. The following testimony is illustrative of the relationship between respondent and claimant:

> Q. (Mr. Fisk) And, again, you mentioned that Mr. Klima could control what you were doing. How could he control what you're doing? Explain that to me.
>
> A. (Claimant) You want me to explain how he could control me? What I do?

---

[9] *Id.*, Ex. 2.

[10] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 337, 510 P.2d 1274 (1973); *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 275, 32 P.3d 1146 (2001).

Q. Yes.

A. I've worked for the man for almost 25 years. I trust him. I believe in what he does. How much more else do you want me to explain that to you? He's like family. So he tells me to do something, sir, I do it. No questions. He asked me to jump, I jump. Same way with Gary Klima.[11]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

CONCLUSION

For purposes of the Workers Compensation Act, on April 12, 2011, claimant's relationship with respondent was more in the nature of an employee than that of an independent contractor.

WHEREFORE, the undersigned Board Member reverses the April 4, 2012, preliminary hearing Order entered by ALJ Fuller and the matter is remanded for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this ____ day of June, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[11] P.H. Trans. at 47.

[12] K.S.A. 2011 Supp. 44-534a.

[13] K.S.A. 2011 Supp. 44-555c(k).

c: Brian D. Pistotnik, Attorney for Claimant
brianpistotnik@pistotniklaw.com

Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
kkruse@bkwwflaw.com

Pamela J. Fuller, Administrative Law Judge